No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari
to the South Dakota Supreme Court

BRIEF FOR *AMICI CURIAE* WASHINGTON STATE TAX PRACTITIONERS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Should this Court abrogate *Quill's* sales-tax only, physical-presence requirement?

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BRIEF OF *AMICI CURIAE*
WASHINGTON STATE TAX PRACTITIONERS
IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici curiae ("Practitioners")[1] are lawyers practicing state and local tax law in Washington State. Practitioners spend parts of nearly every working day applying this Court's Commerce Clause and Due Process Clause precedents in the representation of U.S. and foreign individuals, families, charities, and business organizations of every kind.

Practitioners join this brief solely as individuals and not as representatives of the law firms with which they are affiliated. Each is currently in private practice. Among their number are practitioners who have served in the past as President of the Washington State Bar Association or as chair of the Association's State and Local Taxes Committee. Their experience is not limited to representing taxpayers, some having worked in the past for the Washington State Department of Revenue as a former Assistant Director for Interpretation and Appeals, a second former appeals officer, and a legislative affairs officer. A full list of *amici* appears in Appendix A.

Part of the challenge and satisfaction of

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[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Petitioner and Respondents have filed Blanket Consents to the filing of *amicus curiae* briefs with the Clerk of the Court.

Practitioners' job is explaining to clients and others the not always scrutable ways in which this Court has sought "to accommodate the necessary abstractions of tax theory to the realities of the marketplace." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372 (1991). As the Court itself repeatedly acknowledges, clarity and consistency of doctrinal statements in its opinions are sometimes wanting. Legal advisors to the States, too, experience uncertainty in applying the Court's statements to legislative proposals and legal strategy. *See* Br. of Colorado, et al., at 17.

The Petitioner asks the Court to abrogate a long-standing precedent, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), but the Petitioner's argument is based on a shallow and inaccurate understanding of the doctrinal framework for the case. In particular, while the Petitioner and some supporting *amici* argue that they are seeking a straightforward application of the "substantial nexus" test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), in fact they ask the Court to change the test fundamentally.

The new world of e-commerce clearly poses challenges to public finance, but these challenges do not excuse arguments that obscure the nature of the tax in question or the content of applicable law. Practitioners offer a review, not provided to the same degree in the other briefing, of the development of this Court's relevant case law in order to show what is more broadly at stake in this case.

SUMMARY OF ARGUMENT

1. The Petitioner presents the legal problem in this case as a matter of simple inconsistency between the rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and the fundamental nexus test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Pet'r's Br. at 21-23. This argument is mistaken because it obscures the fact that there are two separate nexus tests at work.

The genealogy of *Complete Auto*'s nexus formulation shows that the test should be read as sustaining a tax "when the tax is applied to an activity [*of the taxpayer*] with a substantial nexus with the taxing State." *Id.* at 279. This test grew out a body of law addressing when a State could impose a tax on a taxpayer itself. By contrast, the core holdings on use-tax collection in *Quill* and *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), are no-nexus counterpoints to a distinct line of cases that upheld a tax-collection obligation as ancillary to an otherwise taxable activity the retailer was conducting within the State. Without saying so expressly, *Quill* reaffirmed that a tax-collection obligation could not be imposed unless the State could already impose a tax on an activity conducted by the business in the State.

Practitioners agree with the Petitioner that the Court should be mindful in this case of Chief Justice Marshall's counsel on how to read "general expressions" in the Court's opinions:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821), *quoted in* Pet'r's Br. at 41. Just so in the case of *Complete Auto*. The Petitioner, unfortunately, betrays that very maxim by omitting discussion of the Court's application of the nexus rule in *Complete Auto* itself as well as the rule's antecedents.

The "general expression" of the Commerce Clause nexus standard in *Complete Auto* is this: a tax will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State." *Id.* at 279. How did this Court apply the "general expression" of its nexus test in *Complete Auto* itself?

First, the Court identified the tax in question in its own words as a "sales tax" imposed, as a statutory matter, as "privilege taxes for the privilege of engaging . . . in business . . . within this state" measured by gross income from the operation of a "transportation business for the transportation of persons or property." *Id.* at 275 (quoting Miss. Code Ann., 1942 § 10105 (1972 Supp.)) (quotation marks omitted). Then the Court observed that the company "did not allege that *its* activity *which Mississippi taxes* does not have a sufficient nexus with the State." 430 U.S. at 277-78 (emphasis added). And indeed the company did engage in transporting property within the State. Hence there was no basis for invalidating the assessment on the nexus ground.

Moreover, every precedent cited in *Complete Auto* as sources for its synthesis of the Commerce Clause tests – every one – concerned a tax *on* the activity *of the taxpayer* in the State.

By contrast, the Court was quite clear in the opinions upholding tax-collection obligations that it distinguished in *Nat'l Bellas Hess, Inc. v. Dep't of*

Revenue of Illinois, 386 U.S. 753 (1967), that the Court was not evaluating a tax imposed *on* the business itself. Instead, that line of cases established that, if a use-tax collection obligation could be imposed, it was because the State *already* had a predicate right to impose a tax on an activity of the business in that State. In other words, if the *Complete Auto* standard is satisfied, then it follows that a use-tax collection obligation can be imposed. This analytical template was followed by the Court in *Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977).

Complete Auto does not authorize imposing a tax on a business because of someone else's activity in the State. Because *Complete Auto* nexus is properly understood as an individualized question based on the taxpayer's activities, as to South Dakota's sales tax – the only tax in question in this case – the issue under *Complete Auto* is whether a specific remote retailer's activity, in selling at retail, has a "substantial nexus with the taxing State." Does a sufficient part of the retailer's activity occur in the State? It appears the record is insufficient to resolve that issue.

Given that the Petitioner acknowledges the Court can retain the specific holdings of *Bellas Hess* and *Quill*, Pet'r's Br. at 42, what is really at stake (though not acknowledged by the Petitioner) is whether the nexus test of *Complete Auto* should be revised. Because the Petitioner has not come to grips with the real import of *Complete Auto*, and because South Dakota's conclusive presumption of in-state activity based on transaction volumes is inconsistent with *Complete Auto*, the Petitioner's argument should be rejected.

2. Deciding this case requires first deciding whether the *Complete Auto* test or the *Bellas Hess/National Geographic* framework applies. For this purpose, the Court should exercise skepticism about the ways Petitioner, its supporting *amici*, and the South Dakota Supreme Court have characterized the tax in question. *See Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443 (1940) ("[T]he descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction.").

Here, the concept of "sales tax" propounded by the Petitioner is any "tax collected or remitted by the seller," regardless whether the legislature imposed the tax on sellers or consumers or on sales or use. Pet'r's Br. at 3 n.1. This abstracted approach is not faithful to South Dakota's own sales tax enactment, let alone the diverse transactional and consumption taxes enacted by the various States. South Dakota's tax is imposed "upon the privilege of engaging in business as a retailer . . . upon the gross receipts from all sales." S.D. Codified Laws § 10-45-2 (Supp. 2017). Seeking reimbursement from the customer is optional at the discretion of the retailer. *Id.* § 10-45-22. The tax is imposed on the seller and is paid by the seller, whether or not the tax amount is added to the selling price. This means *Complete Auto*'s nexus formula applies, and this formula asks whether a particular taxpayer is engaged in retailing activity in South Dakota.

Notwithstanding the text of South Dakota's statute, the South Dakota Supreme Court said below, "Generally, sellers selling merchandise in South Dakota have an obligation to collect and remit sales tax on each transaction." *State v. Wayfair, Inc.*, 901

N.W.2d 754, 756 (2016) (citing S.D. Codified Laws § 10-45-27.3). However, this statute does *not* require tax collection by the retailer. Instead, it says any "person whose receipts are subject to the tax . . . shall . . . file a return, and pay any tax due . . . ." Nothing in the opinion suggests that the Court was intentionally construing the statutory text rather than simply misunderstanding it.

Having reached this critical pivot-point in Commerce Clause jurisprudence, when the Petitioner asks the Court to abrogate a long-standing precedent affecting billions of dollars, the Court should take even more than ordinary care in describing what the object of South Dakota's sales tax is and which taxes are governed by the Court's resolution of this case.

ARGUMENT

I. *Complete Auto*'s Background Shows That Nexus With The Activity Is An Individualized Assessment, And This Case Is Not Properly Framed Upon Individualized Facts.

A. The entire body of law on which *Complete Auto* based its nexus test focused on whether the taxpayer conducted the taxed activity in the State.

1. When a petitioner asks the Court to abrogate one of its decisions, consideration of the deeper background of that decision in the Court's precedents is essential. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is an excellent example of such a historical

review. *See id.* at 279-87. The Petitioner in this case obscures the background of both *Quill* and *Complete Auto* by taking the *Complete Auto* formula as a simple and encompassing doctrinal starting point.

The Petitioner asks the Court to reject the rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), simply by applying the nexus test of *Complete Auto* as written. If "*an* activity" has substantial nexus with the taxing State, as the Petitioner alleges a sale consummated by delivery to the purchaser in the State does, it supposedly does not matter whether the taxpayer has a substantial nexus with the taxing State. *See* Pet'r's Br. at 22-23 (quoting *Quill*, 504 U.S. at 311 (quoting *Complete Auto*, 430 U.S. at 279)) (emphasis altered). Certain supporting *amici curiae* follow this line of argument.[2]

This position does not accurately reflect the substance of the *Complete Auto* test in light of either the Court's analysis in that case or the legacy of case law on which the test was based. The Petitioner, in other words, betrays Chief Justice Marshall's counsel to take the "general expression" of the *Complete Auto* nexus test "in connection with the case in which [that] expression[is] used." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

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[2] *See* Br. of National Governors' Association, et al., at 20 (Court should "simply apply the *Complete Auto* test as it was originally articulated"). *See also* Br. for Colorado, et al., at 1 (urging Court to adhere to *Complete Auto*); Br. of Brill, et al., at 17 (agreeing with Petitioner that the tax satisfies nexus test of *Complete Auto*). *Contra* Br. of Retail Litigation Center, et al., at 28 ("South Dakota's law focuses on a *retailer's* sales activity.") (emphasis altered).

In *Complete Auto*, the tax was imposed on the privilege of doing business measured by gross income, specifically under a subsection applicable to providing transportation of persons or property between points within the State. 430 U.S. at 275. The taxpayer admitted providing such transportation but claimed it could not be taxed because it "was but one part of an interstate movement." *Id.* at 277. Before getting to *Complete Auto*'s oft-cited four-prong test, the Court articulated how the test applied to the taxpayer in question. The taxpayer—

> did not allege that *its activity* which Mississippi taxes does not have a sufficient nexus with the State; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the State.

Id. at 277-78 (emphasis added) (footnote omitted). In other words, in this sentence the Court articulated what the taxpayer must allege in order to plead a Commerce Clause violation. As to nexus, it must allege and then show that *its own* activity, being the object of the tax, is not conducted in the State. This is an "as-applied" test.

Then, having recited the gaps in the taxpayer's pleading, the Court proceeded to synthesize the relevant precedents relied upon by Mississippi in almost exactly the same terms. This synthesis has become the foundational "general expression" of Commerce Clause requirements:

> *These decisions* have considered not the formal language of the tax statute but

> rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Id. at 279 (emphasis added; footnote omitted).

In this way, the "general expression" of Commerce Clause requirements was explicitly grounded on the decisions of the Court that had been brought to the argument by the State of Mississippi, cited in footnote 8 of the *Complete Auto* opinion. So, too, did the Court ground its description of what Complete Auto Transit failed to plead to show a Commerce Clause violation in specific prior opinions, cited in footnote 6 of the opinion. These prior decisions show that the "general expression" of the nexus test focuses not on a disembodied "activity" without an actor, but on whether the taxpayer's activity, to which the tax is applied, is conducted in a substantial way within the State.

Taking the nexus decisions in footnote 6 first:[3]

- *Gen. Motors Corp. v. Washington*, 377 U.S. 436 (1964), involved a gross receipts tax on

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[3] In footnote 6, the Court also cited two discrimination cases, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), and two "fair relationship" cases, *Illinois Cent. R. Co. v. Minnesota*, 309 U.S. 157 (1940); *Ingels v. Morf*, 300 U.S. 290 (1937). Each of these taxes or fees was imposed on in-state activities or property of the burdened taxpayer.

wholesaling. The Court held there was a sufficient "local incident" to support the tax, because General Motors had "employees who were residents of the State and who performed substantial services in relation to General Motors' functions *therein*, particularly with relation to the establishment and maintenance of sales, upon which the tax was based." *Id.* at 477 (emphasis added).

- *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975), involved the same gross receipts tax. In its due process analysis, the Court held the taxpayer's "*in-state activities*" were sufficient to uphold nexus to tax, "[f]or appellant's employee, Martinson, with a full-time job *within the State*, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." *Id.* at 562 (emphasis added).

Taking next the nexus cases cited in footnote 8:

- *General Motors* (see above).
- *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 50 (1959), involved the State's corporate net income tax. The Court held that such a tax is generally permissible if, among other things, it "is properly apportioned to local activities *within the taxing State* forming sufficient nexus to support the same." *Id.* at 452 (emphasis added). The Court then found the imposition in question permissible because the taxpayer had "activities in Minnesota consist[ing] of a

regular and systematic course of solicitation of orders for the sale of its products" through four employed salespersons. *Id.* at 454.

- *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948), involved a franchise or excise tax on doing business in the State levied on capital employed within the State. *Id.* at 81-82. The taxpayer operated a gas pipeline running through Mississippi. The Court relied on the state supreme court's interpretation that the local incidents of the tax were maintaining, keeping in repair, and otherwise attending to the pipeline facilities in the State and held these local activities validated the tax because they could not form the basis for taxation by another State. *Id.* at 86, 88.
- *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), involved a due process challenge to a tax on the privilege of declaring dividends out of income derived from property located and business transacted in Wisconsin. *Id.* at 439 & n.1. Notwithstanding the fact that the tax was formally triggered by an action (declaring dividends) that, in this case, occurred outside Wisconsin, the Court upheld the tax because the "substantial privilege of carrying on business in Wisconsin," *id.* at 444-45 – "within its borders," *id.* at 442 – supported it.

In sum, all of the cases relied on by the Court in *Complete Auto* as the sources of its Commerce Clause template rested their nexus holdings on the local activities *of* the taxpayer *in* the State.

The balance of the *Complete Auto* opinion traced the themes of practicality and realism evoked in the Court's prior opinions in order, ultimately, to justify overruling *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951). These opinions, too, focused *only* on situations where the tax was imposed on activities of the taxpayer in the State.

In *Freeman v. Hewit*, 329 U.S. 249 (1946), the tax was imposed on the gross income of residents and domiciliaries. In this case it was imposed on the sale of stock by an estate trustee domiciled in Indiana. *Id.* at 250. Justice Rutledge's concurrence, discussed in *Complete Auto*, 430 U.S. at 280-81, highlighted that the Indiana domiciliary's activity in selling the stock had sufficient factual connections to Indiana to satisfy due process. 329 U.S. at 271.

The Court then rehearsed the facts and analysis of *Memphis Natural Gas*, which it had already cited as a source of its Commerce Clause synthesis in footnote 8 of the *Complete Auto* opinion. 430 U.S. at 281-82. The Court reiterated that it had found reasonable the state court's position that Mississippi had not sought to "secure anything from the corporation by this statute except compensation for the protection of" the taxpayer's "enumerated local activities." *Memphis Natural Gas*, 33 U.S. at 93.

The Court in *Complete Auto* then identified the significant nexus factor in *Northwestern States* as the fact that the tax was properly apportioned "to local activities within the taxing State" (i.e., the taxpayer's systematic solicitation of sales) that formed the basis for nexus to support the tax. 430 U.S. at 285 (citing *Northwestern States*, 358 U.S. at 464).

Finally, the Court recited a prior summary of its own cases in the opinion in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), where it said its decisions had "sustained . . . state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to *a corporation's* local activities," among other criteria. *Complete Auto*, 430 U.S. at 287 (quoting *Colonial Pipeline*, 421 U.S. at 108) (quotation marks omitted) (emphasis added).

To repeat, all the decisions on which *Complete Auto* relied for the oft-cited nexus formulation, in finding a sufficient nexus, rested on the fact that the tax was justified by a consequential, local activity *of the taxpayer* in the State. None of them said or even implied that the Court would uphold a tax in the absence of a "local" activity *of the taxpayer*. In light of how *Complete Auto* applied its "general expression" of the nexus prong in *Complete Auto* itself, and in light of the entire history behind it, the "general expression" necessarily implies that a tax will be sustained "when the tax is applied to an activity [of the taxpayer] with a substantial nexus with the taxing State," and this "substantial nexus" rests on the fact that a consequential element of the taxpayer's activity occurs in the State.[4]

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[4] *See also Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768 (1992). In that case, the Court observed that the Commerce Clause nexus limitation is grounded in part on the understanding that "to permit each State to tax activities *outside* its borders would have drastic consequences for the national economy." *Id.* at 777-78 (emphasis added). This concern is allied, said the Court, to Due Process Clause jurisdictional limitations, and "we have not abandoned the requirement that, in the case of a tax *on an activity*, there must be a connection to the activity itself,

2. The Petitioner's claim that *Complete Auto* is satisfied in this case appears based on the idea that the "sale" itself is the activity taxed by South Dakota's statute, and the "sale" itself has the necessary nexus with the State. The Petitioner's brief draws support from another "general expression," this one in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995): "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Id.* at 184, *quoted in* Pet'r's Br. at 22. However, the Court in *Jefferson Lines* obviously did not mean by this statement to undermine *Quill*, as the *Jefferson Lines* opinion itself cited *Quill* as representing its dormant Commerce Clause jurisprudence. *See* 514 U.S. at 179.

The facts in *Jefferson Lines* and in the lineage of cases that lay behind the Petitioner's quotation are entirely consistent with reading *Complete Auto* as allowing a tax *on* a seller only when the seller is conducting at least some portion of the taxable activity in the State. As the Court said, the facts justifying nexus in *Jefferson Lines* were that Oklahoma was the State where Jefferson Lines originated service to customers who bought tickets there. 514 U.S. at 184.

The Petitioner's brief does not identify the case *Jefferson Lines* cited in support of its general expression, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). That case involved a New York City sales tax, and the Court noted, Berwind-White maintained a sales office in New York City, and

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rather than a connection only to the actor the State seeks to tax." *Id.* at 778 (citing *Quill*, 504 U.S. at 306-08) (emphasis added).

"[a]ll the sales contracts with the New York customers in question were entered into in New York City." *Id.* at 44. But in that case, the tax was imposed expressly upon the purchaser, *id.* at 42, and not on the activity of the seller.

The Court in *Berwind-White* cited a number of prior decisions in support of the principle that a sale is a local event notwithstanding that the goods had an out-of-state origin. *See id.* at 50. For example, *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1868), involved an Alabama tax imposed on an Alabama merchant with respect to liquors brought into the State for sale from elsewhere. *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923), involved a Texas tax on wholesale dealers in oil measured by sales within the State. It was upheld against a New York corporation, having an office in Dallas and warehouses elsewhere in Texas, on oil imported from outside the State for sale and delivery in Texas. *See id.* at 507-08.

In most if not all of these cases, the Court upheld the tax, in the face of arguments that the tax was imposed unlawfully upon interstate commerce, because the sales were sufficiently "local" events. Thus, the "general expression" in *Jefferson Lines* arose directly from the now-obsolete concern to distinguish taxes on local events from taxes on "interstate commerce" itself, which had animated the position of the Court in *Freeman v. Hewitt* and *Spector Motor Service*. Neither the "general expression" in *Jefferson Lines* nor its origins in prior opinions impeach the understanding of *Complete Auto* discussed above.

B. The Court's use-tax collection cases show the collection obligation is dependent on the taxpayer's carrying on a directly taxable activity in the State; mere advertising was not seen as a substantial part of making sales.

In *Quill*, this Court said that "*Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases." 504 U.S. at 311. Further, as to *Complete Auto*'s nexus test, the Court said *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967)—

> stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.

Id. A look "under the hood" at the case law distinguished by *Bellas Hess* shows what this meant.

The Illinois tax at issue in *Bellas Hess* was a use tax. The State sought to enforce the use-tax collection obligation against National Bellas Hess because it fit the statutory definition of a "retailer doing business in this State" by virtue of "[e]ngaging in soliciting orders within this State from users by means of catalogues or other advertising." 386 U.S. at 754, 755 (quoting Ill. Rev. Stat. c. 120, § 439.2 (1965)) (quotation marks omitted).

The Court in *Bellas Hess* ultimately rejected what it called "advertising nexus," *id.* at 758 n. 11, partly in reliance on the facts and holding of *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). *See id.* at 758-59. In doing so, the Court distinguished five other precedents, making clear that use-tax collection

obligations were not considered "direct" taxes on the seller and that the power of the State to enforce such an obligation had to be based on some activity of the seller in the State – not consumption by the customer – that established a baseline nexus.

- In *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939), the Court addressed whether California could compel a retailer "to serve as an agent for collecting the [use] tax." *Id.* at 64. The seller hired two "general agents" to solicit sales and leased an office in the State for their use in the business. The Court did not rely expressly on the seller's activities in the State in upholding the obligation, but rather upon a prior decision having the same flavor, *see id.* at 66-68:
  - In *Monomator Oil Co. v. Johnson*, 292 U.S. 86 (1934), Iowa imposed a use tax on motor fuel. The corporation in question bought and sold, manufactured and blended gasoline and similar products, including at a refinery in Iowa. *Id.* at 90-91. "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement." *Id.* at 93 (citations omitted). The Court concluded that "the statutes properly construed lay no tax whatever upon distributors." *Id.* at 95.[5]

[5] The Court in *Felt & Tarrant* also relied, in points not germane to the argument, on *Henneford v. Silas Mason Co.*, 300

- In *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941), the taxpayer had retail stores in Iowa and also conducted mail-order sales by use of a catalogue. Like California's statute in *Felt & Tarrant*, Iowa imposed a use-tax collection obligation on retailers that maintained a place of business in the State. *Id.* at 361. Per the Court, "the nub of the controversy centers on the use of respondent as the collection agent of Iowa." On the facts, the Court held that the mail orders "are still part of respondent's Iowa business," and because Iowa had extended Sears the privilege of conducting business within the State, "Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business." *Id.* at 364 (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940)). The Court distinguished pure mail-order houses as "not doing business in the state as foreign corporations." *Id.* at 365.
- *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941), was a companion case to *Sears, Roebuck* and involved the same Iowa tax. Given that employees at local stores conducted activities in Iowa "pursuant to its permit to do business in that state," the fact that other employees outside Iowa handled mail-order sales did "not permit respondent to escape the burden which Iowa has exacted as a price of enjoying the full

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U.S. 577 (1937), and *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921).

benefits flowing from its aggregate Iowa business." *Id.* at 375 (citing *Sears, Roebuck*). An additional factor was present – the placement of advertisements *by the local stores* regarding mail-order products as well as in-store merchandise. To the Court, this fact meant that Montgomery Ward solicited mail-order sales "in Iowa" through "local advertising" that was no different, in constitutional terms, from local-agent solicitations as in *Felt & Tarrant*. *Id.* at 376.

- *Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335 (1944), involved the same use-tax collection statute as in *Sears, Roebuck* and *Montgomery Ward*, but in this case the corporation had not qualified to do business in Iowa and solicited orders via traveling "salesmen." *Id.* at 337. The Court observed that the *Felt & Tarrant* case was "indistinguishable" – "nothing [could] turn on" variation in the means of soliciting orders within the State. *Id.* at 337. "To make the distributor the tax collector for the State is a familiar and sanctioned device." *Id.* at 338 (citing *Monamotor* and *Felt & Tarrant*).
- Finally, in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), Florida imposed the use-tax collection duty on dealers who solicited business either by representatives or by the distribution of advertising matter. *Id.* at 207 & n.1 (citing and quoting Fla. Stat. § 212.06). Scripto solicited sales through 10 broker/salespersons operating in the State

> designated as independent contractors. *Id.* at 209. Noting that the company "is charged with no tax—save when, as here, [it] fails or refuses to collect it from the Florida customer," *id.* at 211, the Court held that the test for compelling use-tax collection "is simply the nature and extent of the activities of the appellant *in* Florida." *Id.* at 211-12 (emphasis added). The Court distinguished *Miller Bros.* on this fact: "Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales." *Id.* at 212.

In all these situations, this Court said in *Bellas Hess*, "the out-of-state seller was plainly accorded the protection and services of the taxing State." 386 U.S. at 757.[6] In other words, had the State framed a tax imposed directly on the out-of-state sellers in these cases on account of their own activities in the State (as it had done in some of the cases), it could have enforced that tax, too – so the potentiality of a State tax consistent with *Complete Auto* existed. The absence of such a potentiality in *Bellas Hess* – given that the Court did not accept the validity of an "advertising nexus," *id.* at 758 n.11 – defeated Illinois's attempt to enforce the use-tax collection obligation.

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[6] *See also Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977) (advertising sales activity at two offices in the State established "a relationship or 'nexus' between the Society and the State," which rendered derivative use-tax collection obligations constitutional).

C. South Dakota's conclusive nexus presumption based on sales volumes does not comport with *Complete Auto*'s as-applied test; if "delivery" is the targeted activity of online retailers, the State needs to show the particular delivery mechanism can be attributed to the retailer.

1. South Dakota enacted a conclusive presumption of a "substantial nexus" between the State and the selling activities of remote retailers based on sales volumes – either an annual level of gross revenue from sales "delivered into" the State of $100,000 or more, or an annual number of taxable transactions "for delivery into" the State of 200 or more. S.B. 106, 91st Legis. Assemb. Session, §§ 1(1), (2) (S.D. 2016). This "economic nexus" approach may have an attractive simplicity, but it does not comport with the requirement of *Complete Auto*, properly understood, that the tax be applied to an activity *of the taxpayer* conducted in consequential part in the State.

The reason the nexus prong of *Complete Auto* is properly conceived as an as-applied test is that, if the State is not taxing an activity of the taxpayer *in* the State, it is improperly taxing an activity occurring somewhere else. *See Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777-78 (1992).

South Dakota's approach attempts to avoid the fundamental factual question underlying this Court's cases about nexus over selling activities. The opinion in *Scripto* captured the issue most clearly in distinguishing that case from *Miller Bros.* In *Miller Bros.*, the Court said, "Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales." *Scripto*, 362 U.S. at 212. The same question obtains for sales on the Web: did the South Dakotan

go to the retailer to make a purchase, or did the retailer go to South Dakota to make the sale? This question is not answered by arbitrary volume thresholds.

What is at stake in adopting a conclusive economic nexus presumption is therefore not only overthrowing *Quill* but also whether the Court will discard the meaning of the "activity" test of *Complete Auto* and push aside the underlying concern of the Commerce Clause about the consequences of allowing one State to tax activities that take place in other States, as exemplified by *Miller Bros.* and *Allied-Signal*.

2. The South Dakota statute might be interpreted as trying to meet the *Complete Auto* test by attributing the activity of "delivery" of tangible personal property, electronically transferred property, and services "into South Dakota" to the seller. *See* S.B. 106, §§ 1(1), (2) (Pet'r's Br. App.1a) (limiting the gross receipts or transactions counting toward the conclusive-presumption thresholds to products delivered into South Dakota). That is, should the statute be understood as ascribing the delivery process to the remote seller and treating the delivery process, part of which necessarily occurs in South Dakota, as an integral component of making sales at retail?

Treating a remote seller's management of delivery mechanisms in a State as a "local incident" of retailing, sufficient to serve as a "substantial nexus" with the retailing activity, would not be consistent with this Court's tradition, as shown by *Bellas Hess* and such cases as *American Oil Co. v. Neill*, 380 U.S. 451 (1965), and *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951). Regardless whether it might be a legitimately debatable question within the *Complete*

Auto framework, the text of the statute does not support a finding that South Dakota's legislature intended to base its taxing authority on a "delivery nexus" apart from sales volumes, and the issue was not argued or decided below.[7]

Moreover, delivery methods for tangible personal property, electronically transferred property, and services are diverse. The latter two classes, in particular, raise the *Miller Bros.* question whether South Dakotans went "to" the seller to make their purchases. In any event, Practitioners are not aware of adequate data in the record about Respondents' delivery methods that could support a conclusion at this stage that they are engaged "in business as a retailer" *in* South Dakota.

3. The question presented by the Petitioner is not well framed. Rather than "abrogate" *Quill*, the Petitioner now tells this Court that it can retain *Quill*'s holding as far as it goes. Instead, the Petitioner asks the Court to validate a conclusive nexus presumption for e-commerce based on sales volumes. This request actually asks the Court to abrogate the more fundamental, as-applied nexus test of *Complete Auto*. To be faithful to *Complete Auto* and the body of law it represents, the Court should reject the Petitioner's argument and affirm the decision below.

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[7] Also, nothing in S.B. 106 indicates any intent by South Dakota to rely on an "advertising nexus," *cf. Bellas Hess*, 386 U.S. at 758 n.11, by treating advertising in the State as an integral component of making sales at retail. The South Dakota Supreme Court also said nothing about considering advertising or delivery as in-state components of the retail business in the decision below.

II. Confusion About The Nature Of The Tax In Question Should Be Avoided.

The Petitioner asks the Court to rest its decision in this case on a new, nationwide abstraction of the diverse taxes that may be implicated by conclusive economic nexus presumptions. Ostensibly "[f]or clarity," the Petitioner uses "sales tax" to mean "a tax collected and remitted by the seller" and "use tax" to mean "a tax remitted by the consumer." Pet'r's Br. at 3 n.1.

Reimagining state taxes with this typology undermines the "substantial nexus" test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), because it necessarily confuses the issue whether "the tax *is applied to* an activity" of the taxpayer. *Id.* at 279 (emphasis added). Each tax, whether well framed by the legislature or not, has an object or incident. It is "applied" to an object or incident. Fashioning a constitutional rule based on abstracted mechanisms of collection and remittance rather than concrete state legislative enactments would step away from the "realities" the Court is trying to reflect. *See Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372 (1991). A use tax, even if collected by a retailer, is typically applied to "the privilege of use after commerce is at an end." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937). What good would it accomplish suddenly to call use taxes "sales taxes," when the Court has been clear for many decades that it is not the case?

According to the statutory text, South Dakota "applies" its sales tax to the retailer alone. The tax is imposed "upon the privilege of engaging in business as a retailer . . . upon the gross receipts from all sales."

S.D. Codified Laws § 10-45-2 (Supp. 2017). Seeking reimbursement from the customer is optional at the discretion of the retailer. *Id.* § 10-45-22. This means *Complete Auto*'s nexus formula asks whether the particular person is engaging in retailing activity in South Dakota.

A different model is exemplified by Washington State, where the "sales tax" is imposed "on each retail sale in this state" of specified goods and services, Wash. Rev. Code § 82.08.020(1), and the statute requires the tax "must be paid by the buyer to the seller." *Id.* § 82.08.050(1). Indeed, in contrast to South Dakota, Washington generally *prohibits* sellers from directly or indirectly paying the tax owed by the buyer, on pain of a misdemeanor. *Id.* § 82.08.120.[8]

The Court does not need to treat these different models the same way in order to sustain a coherent Commerce Clause framework. *Complete Auto* controls the one (South Dakota) and the seller's obligation to collect the tax in the other (Washington) is not treated as a direct tax but instead can be triggered by *non*-retailing activities of the seller in the State. *See Irwin Naturals v. State*, 382 P.3d 689, 695-96 (Wash. Ct. App. 2016) (relying on *Nat'l Geographic Soc'y v.*

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[8] The differences in how these state legislatures have selected the object of taxation are not merely a matter of "formal language," *cf. Complete Auto*, 430 U.S. at 279, but instead they have real-life consequences. For example, California's sales tax is generally in the South Dakota model – a tax imposed on a retailer's gross receipts for the privilege of selling tangible personal property, Cal. Rev. & Tax. Code § 6051 (2016 and Supp. 2018) – except that a California retailer's right to obtain reimbursement of the sales tax from a customer depends on the customer's express or implied consent as a matter of contract. *See* Cal. Civ. Code § 1656.1 (2016 and Supp. 2018).

California Bd. of Equalization, 430 U.S. 551 (1977)), *cert. denied*, 138 S. Ct. 238 (2017).

The South Dakota situation is confused, however, by the South Dakota Supreme Court's apparent error in stating that state law requires the retailer to collect sales tax from the purchaser. *See State v. Wayfair, Inc.*, 901 N.W.2d 754, 756 (2016) (citing S.D. Codified Laws § 10-45-27.3). However, this section does *not* require tax collection by the retailer. Instead, it says any "person whose receipts are subject to the tax . . . shall . . . file a return, and pay any tax due . . . ." Nothing in the opinion suggests that the Court was construing the statutory text rather than simply misunderstanding it.

The website of the State's Department of Revenue contains statements also indicating the Court's statement was a casual error. Per the Department of Revenue's Sales and Use Tax Guide, "South Dakota law *allows the seller to add the tax* to the price of the product or service. However, the seller is liable for the sales tax due, whether or not it is collected." "Sales and Use Tax Guide" at 3 (July 2017) (emphasis added), http://dor.sd.gov/Taxes/Business_Taxes/Publications/Sales_Tax.aspx (last visited April 3, 2018).

These facts are inconvenient also for the argument of the United States as *amicus curiae* supporting the Petitioner. It argues that *Complete Auto* does not control this case, but instead the Court should apply the Commerce Clause balancing framework of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Br. of United States at 8. It claims that "[t]his case concerns the application of the dormant Commerce Clause to a state tax-collection requirement." *Id.* at 1. Perhaps based on the section title of S.D. Codified Laws § 10-64-2

(Supp. 2017),[9] it argues that remote sellers are required "to collect taxes on the sales of goods or services into the State." *Id.* at 6. In fact, the cited statutory text does not impose this requirement, but instead requires remote sellers to "*remit* the sales tax and [to] follow all applicable procedures and requirements of law as if the seller had a physical presence in the state." S.D. Codified Laws § 10-64-2 (Supp. 2017) (emphasis added). This remittance requirement, as noted above, is in fact a payment requirement, with no obligation to seek any kind of reimbursement from the customer. *Id.* §§ 10-45-22, 10-45-27.3.

It may be tempting to say South Dakota's sales tax is a sales tax like any other (according to the Petitioner) or is a tax-collection obligation like any other (according to the United States), but these positions are rather like calling an apple a banana. Unless the Court wants to fundamentally alter the scope and meaning of the nexus text of *Complete Auto*, it should treat the tax as imposed on the retailer's retailing activity, just exactly as the statute says. South Dakota's conclusive nexus presumptions do not establish the fact of an in-state activity of the retailer, as required by *Complete Auto*, and should be rejected by this Court.

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[9] The brief for the United States does not cite to the South Dakota Supreme Court decision.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Washington State Tax Practitioners respectfully request that the Court affirm the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

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